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Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 893–894

GEORGE E. EDDY and SAMUEL SILBIGER,

Petitioners,

vs.

CHARLES H. KELBY and CLIFFORD S. KELSEY, Trustees of the Debtor, PRUDENCE-BONDS CORPORATION (New Corporation), RECONSTRUCTION FINANCE CORPORATION, et al.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

CHARLES H. KELBY,
Pro se and Counsel for the Trustees of Prudence-Bonds Corporation, Debtor, Geo. C. Wildermuth and Clifford S. Kelsey.

CHARLES M. MCCARTY,
Counsel for Prudence-Bonds Corporation (New Corporation).

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Opinions Below

The Circuit Court of Appeals rendered no opinions on the motion for the allowance of the appeal or on the motion to dismiss the appeal taken as of right.

Jurisdiction

The order of the Circuit Court of Appeals denying leave to appeal was entered January 7, 1943 (R. 92). The order of the Circuit Court of Appeals dismissing the appeal was entered March 2, 1943 (R. 118).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Section 347).

Questions Presented

In order to make effective, consummate and carry out Plans confirmed in a proceeding pending before it for the reorganization of a corporation under Sec. 77B of the Bankruptcy Act, the bankruptcy court authorized and directed Corporate Trustees of the Debtor's bond issues to account in the reorganization proceeding. Services were performed and expenses incurred in connection with certain of such accountings. By order made in the reorganization proceeding on December 10, 1942, the bankruptcy court awarded allowances for such services to the reorganization Trustees of the Debtor and their attorney, to petitioner Silbiger and another attorney for individual bondholders, and also awarded an allowance for expenses to the new corporation formed under the confirmed Plans. The Circuit Court of Appeals denied an application by petitioners for leave to appeal from such order. Thereafter and within the time provided by Sec. 25(a) of the Bankruptcy Act, petitioners sought to appeal as a matter of right. The Circuit Court of Appeals dismissed the appeal. The question is:

> Was the appeal from such order on allowances one which could be had only in the discretion of the Circuit Court of Appeals under Sec. 250 of the Bankruptcy Act? [1]

Statement

The order of the bankruptcy court, from which petitioners sought to appeal, was made in the proceeding for the reorganization of Prudence-Bonds Corporation, Debtor, under Sec. 77B of the Bankruptcy Act (R. 104). Although

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[1] In addition to seeking a review of the order dismissing the appeal taken as of right, Petitioners also seek a review of the order denying their application for leave to appeal. The "Questions Presented" in the Petition, however, do not include any question as to whether the Circuit Court of Appeals abused its discretion in denying the motion for leave to appeal.

Plans have been confirmed (R. 96), the bankrupt estate is still in the process of administration, in that the reorganization Trustees of the Debtor and other parties are engaged in compelling restoration of trust funds securing the Debtor's bonds (R. 53, 58). Accordingly, no report has been filed showing that the Plans have been carried out and no final decree has been entered closing the case (R. 103).

When its petition for reorganization was approved, the Debtor corporation had outstanding eighteen Series of First Mortgage-Collateral Bonds (R. 95). Each Series was secured by a separate Trust Agreement made by the Debtor to a bank, as Trustee, under which bonds and mortgages and other securities were assigned and delivered to each Trustee as a Trust Fund for the benefit of the bondholders (R. 95-96). Eleven banks were Trustees under these Trust Agreements, one of which was City Bank Farmers Trust Company, Trustee of five of the eighteen Series of Bonds (R. 96).

A separate Plan of Reorganization for each Series of Bonds and a General Plan of Reorganization were confirmed (R. 96). The General Plan provided, in part, for the formation of a new corporation, with the same name as the Debtor, to be wholly owned by the bondholders, the Debtor having been found to be insolvent (R. 96). The separate Series Plans provided, among other things, for Modified or Supplemental Trust Agreements (R. 96).

By the orders of confirmation, the bankruptcy court reserved jurisdiction to give such further authorization and directions as might be necessary or proper in order to make effective, consummate and carry out the Plans and the orders of the bankruptcy court relating thereto (R. 96-97).

The bankruptcy court, as part of the proceedings to make effective and carry out the confirmed Plans, made an order on April 27, 1938,[2] which approved the appointment of a

[2] The order of April 27, 1938, applied in most respects to 17 of the 18 Series of Bonds. A similar order was made on June 6, 1938, with respect to the one remaining Series (R. 3-4, 113).

particular trust company as the new Corporate Trustee for all eighteen Series of Bonds; approved the form of Supplemental Trust Agreements to be made by the New Corporation to the new Corporate Trustee; authorized and directed the old Corporate Trustees to transfer their respective Trust Funds to the new Corporate Trustee; and authorized and directed the Debtor and its Trustees in bankruptcy, to transfer their right, title and interest in the Trust Funds to the New Corporation[3] (R. 3, 97, 111-112). Such order further authorized and directed the old Corporate Trustees to:

> "* * * prepare and file in this proceeding, an account of their respective acts and proceedings under the Original Trust Agreement pertaining to their respective Series of Bonds * * *, and to make an appropriate application for the judicial settlement herein of said accounts * * *" (R. 97).

Each of the old Corporate Trustees, thereafter, filed in the reorganization proceeding, an account of its acts as such Trustee since the inception of its particular Trust or Trusts and petitioned the bankruptcy court for an order taking, determining and judicially settling its accounts and releasing and discharging it from all responsibility with respect to its acts as Trustee and with respect to all matters contained in its accounts (R. 98). Upon such accounts and petitions, the bankruptcy court Judge signed orders to show cause, entitled in the reorganization proceeding, directing all parties in interest to show cause why the relief prayed for should not be granted (R. 98).

Reversing the District Court on a question later raised as to jurisdiction, the Circuit Court of Appeals, in uphold-

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[3] In *Brooklyn Trust Company* v. *Kelby*, 134 F. 2d 105, 109, involving a later phase of the Corporate Trustees' accountings, the Circuit Court of Appeals noted that when "the debtor and its trustees in bankruptcy, pursuant to the court's order, transferred all their interests in the trust funds to the new company, neither the new company nor the trustees in bankruptcy nor the court were aware of any wrongful acts on the part of the old corporate trustees".

ing the jurisdiction of the bankruptcy court over the accounts and objections thereto, unanimously decided that the liability of the old Corporate Trustees for any diversion or waste of the Trust Funds would be to "restore the waste of assets" or to "restore the *res*"; that recoveries on the objections would go back into the Trust Funds or *res;* and that the liability of the old Corporate Trustees, as well as the right and remedy to compel restoration of the *res,* constituted property of the Debtor within the meaning of the Bankruptcy Act (*Central Hanover Bank & Trust Co., et al.* v. *President and Directors of the Manhattan Company, et al.,* 105 F. 2d 130).[4]

Upon the decision and mandate of the Circuit Court of Appeals on such appeal, the bankruptcy court, by an order made in the reorganization proceeding on July 12, 1939, decreed that "to make effective, consummate and carry out the" confirmed Plans, "this Court in the above entitled proceedings, has and hereby takes, full, complete and exclusive jurisdiction to take, determine and judicially settle" the accounts of the old Corporate Trustees and to hear and determine all objections thereto (R. 99). Such order further provided, that any objections of the New Corporation or of the reorganization Trustees of the Debtor, be

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[4] The decision of the Circuit Court of Appeals in the *Central Hanover* case cited above, has been reaffirmed and restated by the Circuit Court of Appeals on two occasions in passing upon subsequent appeals from orders of the bankruptcy court relating to the accountings by the old Corporate Trustees; first in *Manufacturers Trust Company* v. *Kelby,* 125 F. 2d 650, and again at length in *Brooklyn Trust Company* v. *Kelby,* 134 F. 2d 105. In the *Manufacturers Trust Company* case, this Court denied certiorari (316 U. S. 697) and in the *Brooklyn Trust Company* case, the Circuit Court of Appeals noted the fact that such petition for certiorari "asked reversal not only of our decision in the *Manufacturers Trust* case but also of our previous decision, as to jurisdiction, in the *Central Hanover* case" (134 F. 2d 105, 110).

Subsequent to the filing of the petition for certiorari here under consideration, Brooklyn Trust Company filed a petition for certiorari to review the decision of the Circuit Court of Appeals in the *Brooklyn Trust Company* case.

deemed and constituted to be made on their own behalfs and on behalf of the bondholders, and authorized bondholders to join in and adopt any such objections (R. 51-52). By such order, the bankruptcy court, again specifically reserved and retained jurisdiction to "make effective, consummate and carry out the" confirmed Plans of Reorganization (R. 99).

Among the accounts of the old Corporate Trustees which, together with objections thereto, were thereafter the subject of hearings before a Special Master appointed by the bankruptcy court, were the five accounts of City Bank Farmers Trust Company, as Trustee under the original Trust Agreements securing five of the Debtor's eighteen Series of Bonds (R. 100). Objections to each of such accounts were filed by the New Corporation and the reorganization Trustees of the Debtor. Three bondholders, through their attorney petitioner Silbiger, filed objections to the accounts in four of the five Series, one of which bondholders was petitioner Eddy, who had filed objections to the accounts in two Series. Objections to some of such accounts were also filed by three other bondholders, through their attorney Joseph Nemerov, Esq. (R. 100).

All objections to the five accounts of City Bank Farmers Trust Company, as Trustee, were subsequently compromised and settled with the approval of the bankrutcy court by an order made in the reorganization proceeding on August 27, 1942 (R. 100-101). By such settlement, City Bank Farmers Trust Company, individually, paid into the five Trust Funds for which it was Trustee, $650,000 cash and in addition turned into one of the Trust Funds, a share in a certain mortgage, which share had cost City Bank Farmers Trust Company, individually, the sum of $133,500 (R. 100). The order approving such settlement, which was made after a hearing on notice to all bondholders, intervenors and parties in interest, provided for the manner and time of filing applications for allowances for services and expenses in connection with the accountings by City Bank Farmers Trust Company, the time and manner of filing

objections to applications for such allowances, and fixed a date for a hearing before the bankruptcy court on the applications and objections (R. 101-103).

Applications for allowances for such services were thereafter filed by the reorganization Trustees of the Debtor, their attorney, petitioner Silbiger and by Joseph Nemerov, Esq. (R. 15). An application for an allowance for expenses was filed by the New Corporation (R. 15). Neither petitioner Eddy, who did not apply for an allowance, nor petitioner Silbiger, filed objections to any of the allowances requested, although they had due notice of the time to file objections and of the hearing on the applications for allowances (R. 14). Objections to allowances requested were, however, filed by the New Corporation and by Reconstruction Finance Corporation, an intervenor in the reorganization proceeding (R. 15-68, 71-86).

The order of the bankruptcy court, which petitioners sought to appeal from, passed upon the applications for such allowances and the objections thereto (R. 103). Such order was made in the reorganization proceeding on December 10, 1942 (R. 104). Petitioner Silbiger had applied for an allowance of $42,566.67 and was awarded $6,000 (R. 107).

Petitioners Silbiger and Eddy applied to the Circuit Court of Appeals for leave to appeal from the said order on allowances (R. 1-12). Such application was denied by order of January 7, 1943 (R. 109). Thereafter and within the time provided by Sec. 25(a) of the Bankruptcy Act, petitioners served a notice of appeal and attempted to appeal as of right (R. 108). On motion, the Circuit Court of Appeals dismissed such appeal by order of March 2, 1943 (R. 118).

I

An appeal from the order on allowances could only be had in the discretion of the Circuit Court of Appeals.

In *Dickinson Industrial Site Inc.* v. *Cowin,* 309 U. S. 382, this Court decided that under Section 250 of the Bankruptcy Act appeals from orders on allowances in corporate reorganizations "may be had only at the discretion of the Circuit Court of Appeals".

Petitioners contend, however, that the rule of the *Dickinson* case is inapplicable to the order on allowances here involved. Their theory appears to be that the services and expenses for which the awards were made were not rendered or incurred in connection with the plan or the proceeding within the meaning of the Bankruptcy Act.[5]

Petitioners' alleged principal reason for granting certiorari is the suggestion that unless they are permitted to appeal, trust funds belonging to bondholders "will have been summarily taken from them and distributed to strangers, who have no interest in such trust funds" (petition, p. 10). But the "strangers" to whom they refer are the Debtor's trustees in bankruptcy and their counsel! Not so long ago, however, petitioners regarded the Debtor's Trustees as anything but "strangers". They said in a brief in the Circuit Court of Appeals in the *Central Hanover* case, *supra:*

> "Title to the Claims of the Bondholders Predicated on the Mismanagement and Improper Diversion of the Trust Funds or *Res,* Vested in the Debtor's Trustees as Assets of This Estate and a Right of Action Accrued to Such Trustees to Enforce Such Claims and Recover the Diverted Funds or Their Equivalent for Proper Distribution Among the Creditors Entitled to Share Therein" (R. 91).

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[5] This is not a case where a party has mistakenly pursued the wrong method of appeal. Petitioners attempted to appeal as a matter of right, only after leave to appeal had been denied.

Petitioners now pretend to be greatly concerned about a fancied wrong to bondholders resulting from the granting of allowances to the reorganization Trustees and their counsel. They did not, however, even object to any of the applications in the District Court, although they had due notice of them (R. 14, 69, 87, 89).

The fact is petitioners are not at all concerned about the bondholders. They are trying to obtain for petitioner Silbiger an allowance many times the amount which the District Court decided he was entitled to. And to achieve the result, they argued in the Circuit Court of Appeals that the total of all allowances was inadequate (R. 12).[6]

Petitioners' real view as to the status of the reorganization Trustees was shown when they wrote the quotation set forth above and when later they joined with such Trustees (whom they now call "strangers" and "volunteers"), and with other respondents in a brief filed in this court in which it was argued that the bankruptcy court in the Debtor's reorganization proceeding had undoubted jurisdiction to settle the Corporate Trustees' accounts and to pass upon objections thereto.[7] Indeed, petitioner Silbiger has stated that he agreed that counsel for the reorganization Trustees of the Debtor should conduct the trial of the objections to the Corporate Trustees' accounts (R. 6, 90). Despite such statement, he now has the temerity to contend that the reorganization Trustees and their counsel should not have been paid for work which he himself agreed they should do.

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[6] The total of the allowances awarded by the District Court was $69,635 for services and $29,195.94 for expenses, or $98,830.94 (R. 106). Petitioner Silbiger had contended that the total of the awards should be $127,700 for services and $29,195.94 for expenses, or $156,895.94, and that he, petitioner Silbiger, should have been awarded $42,566.67 or one-third of his suggested total of $127,700 for services (R. 8).

[7] Respondents' brief in opposition to petition for certiorari in the *Manufacturers Trust Company* case, *supra*.

At all events, the Circuit Court of Appeals in the *Manufacturers Trust Company* case, *supra,* affirmed an order of the District Court decreeing that the reorganization Trustees of the Debtor were necessary parties to the accounting proceedings. And as previously noted, this Court denied certiorari in such case.

Petitioners apparently believe that Section 250 should be restricted so as to exclude from its application appeals from orders granting or denying allowances for services or expenses in connection with proceedings had in the reorganization court in order to make effective and carry out a confirmed plan. An order confirming a plan, however, is not, as petitioners suggest, analogous to a confirmation of a composition. The latter operates as a discharge, the former is but a step in the administration of the Debtor's estate; in a corporate reorganization a discharge is effected not by confirmation of a plan, but by the final decree (*Meyer* v. *Kenmore Grantville Hotel Co.,* 297 U. S. 166, 167). As stated in *In re Paramount-Publix Corp.,* 82 F. 2d 230, 232-233:

> "However, as long as there is an asset, tangible or intangible, in the court's control, the estate may be considered to be in administration. * * * There are assets of the estate outstanding and in the court's control. Trustees are obligated to collect these assets under the direction of the court by section 47 a (2) of the Bankruptcy Act, as amended (11 U. S. C. A. Sec. 75(a) (2)), and until this duty is discharged and the assets collected are out of the court's hands the estate is still in administration."

Since the decision of this Court in the *Dickinson* case, the Circuit Courts of Appeals have uniformly decided that Sec. 250 applies to all orders on allowances in corporate reorganizations. They have consistently declined to engraft exceptions on the rule that appeals from such orders may only be had in their discretion.

In re Von Kozlow Realty Co., 116 F. 2d 673, the appellants contended that the order on appeal was not an order on allowances, but one fixing the amount of a claimed lien. The Court rejected such contentions, held that Section 250 was applicable, and dismissed the appeal. Similar contentions were rejected in *In re Prudence-Bonds Corporation*, 111 F. 2d 37, 41 (reversed on other grounds, 311 U. S. 579), where Corporate Trustees of this Debtor's bond issues contended that their appeals from an order awarding them allowances were not governed by Section 250, since under the Trust Agreements they had liens on the Trust Funds for their services and expenses. Cf. *Gross* v. *Bush Terminal Co.*, 105 F. 2d 930; *Reconstruction Finance Corporation* v. *Bankers Trust Company*, U. S. , 87 L. Ed. 481.

In re Country Club Bldg. Corp., 128 F. 2d 36, is another illustration of an unsuccessful attempt to avoid the applicability of Section 250. In that case an allowance had been made to a Special Master for services. The allowance was paid by the debtor, but was chargeable against appellant. The debtor obtained an order awarding judgment against appellant for reimbursement of the amount paid. Appellant attempted to appeal from such order as a matter of right, more than thirty (30) days after the entry of the order. Appellant there like petitioners here, contended the appeal was governed by the Judicial Code, 28 U. S. C. A. Section 230, and not by Sections 25 (a) and 250 of the Bankruptcy Act. In rejecting such contentions and dismissing the appeal, the Circuit Court of Appeals stated (pp. 37-38):

> "Appellant tacitly concedes that these provisions (Sec. 250, Sec. 25,a) are controlling, if applicable, but denies their applicability to the instant situation. In order to escape the former (Sec. 250), it is argued that the order appealed from was not 'making or refusing to make allowances of compensation or reimbursement' and, to escape the latter (Sec. 25,a) argues that the order appealed from was not entered in the reorganization proceeding.
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> * * * * * *

Was this an order within the statutory language 'making or refusing to make allowances of compensation or reimbursement'? We think it was. * * * Such being the case, Section 250 is applicable and the appeal could have been properly taken only by permission of this court.

We also think plaintiff is in error in his contention that he had three months to perfect his appeal, as is provided by Section 230, 28 U. S. C. A., rather than the thirty day period provided by Section 48 sub. a, 11 U. S. C. A. This is dependent, of course, upon the premise as to whether the order appealed from was a final judgment within the meaning of the former provision, or an order in the reorganization proceeding within the meaning of the latter provision.

(4) It is true, as pointed out by appellant, that a final decree was entered in the reorganization proceeding December 2, 1938, prior to the entry of the order appealed from. This decree, however, expressly reserved jurisdiction for the 'purpose of determining the question of whether or not costs should be assessed against John Murphy (instant appellant) et al., bondholder claimants herein, in the Matter of the Petition of Murphy et al. v. Bloom et al. It is true also that at the time of the entry of this decree the costs included in the order appealed from had been allowed and paid by the debtor. Notwithstanding this, however, we think the reservation in the final decree was such that the court retained jurisdiction of an action seeking reimbursement from appellant for such payment by the debtor. The order appealed from is therefore one entered in the reorganization proceeding, an appeal from which was only allowable within thirty days from the date of its entry.

It follows from what we have said that this court is without jurisdiction to entertain the appeal and for that reason appellee's motion to dismiss is allowed."

Here no final decree has been entered and by the orders of confirmation the bankruptcy court reserved appropriate jurisdiction to carry out the Plans (R. 103, 96, 97, 99, 101). The order on allowances was made and entered in the reorganization proceeding (R. 104). Under an order of the

bankruptcy court, the allowance applications were filed, notice given and a hearing thereon held in accordance with the provisions of the Bankruptcy Act and the Rules of the District Court (R. 102-103). The money and property recovered on the objections to the Corporate Trustees' accounts was paid into the Trust Funds securing the Debtor's reorganized bonds (R. 16-17). The allowances awarded, including the award to petitioner Silbiger, were by the order of the bankruptcy court, directed to be paid out of such Trust Funds (R. 106). The services and expenses for which the awards were made, were rendered and incurred in connection with the accountings by Corporate Trustees for their acts with respect to such Trust Funds (R. 101, 104-105). The bankruptcy court took exclusive jurisdiction over such accountings for the express purpose of making effective, consummating and carrying out the confirmed Plans (R. 99). Such jurisdiction has been upheld on three occasions by the Circuit Court of Appeals (*Central Hanover Bank & Trust Co. et al.* v. *President and Directors of the Manhattan Company, et al.; Manufacturers Trust Company* v. *Kelby; Brooklyn Trust Company* v. *Kelby, supra*). And as pointed out *supra* page 5, in the *Manufacturers Trust Company* case, one of the accounting Corporate Trustees sought certiorari to review such decision and also the earlier decision in the *Central Hanover* case. In the *Brooklyn Trust Company* case, also involving the accountings in the reorganization court, the Circuit Court of Appeals stated (134 F. 2d 110-112):

> "Since, despite our earlier decisions in the *Central Hanover* and *Manufacturers Trust* cases, the appellant on the present appeal again raises the question of the jurisdiction of the bankruptcy court over the restoration actions, it is desirable here to restate, somewhat more amply, our reasons for sustaining its jurisdiction: One of the primary purposes of a reorganization proceeding under Sec. 77B (as distinguished from ordinary bankruptcy) is to bring about an adjustment of secured debts. The jurisdiction to con-

firm a reorganization plan therefore extends to property securing obligations owing to secured creditors even if the debtor no longer has an 'equity' in that property. As the court has jurisdiction of such property, it also has jurisdiction of trustees who are holding it for the secured creditors. Nor is this jurisdiction left to inference: Under Sec. 77B, sub. b(9) a plan 'shall provide adequate means for' its 'execution' which means 'may include * * * the satisfaction or modification of liens, indentures, or other similar instruments'; and Sec. 77B sub. h provides that, upon confirmation of a plan, the court may direct 'the trustee of any obligation of the debtor * * * to make' any necessary transfer or conveyance of any property dealt with by the plan. Necessarily, those powers include the power to direct such a trustee to convey the trust property to a new trustee; it follows that to require a full accounting for that trustee's earlier conduct with reference to such trust property is an inherent part of the judicial administration of the estate in the court's legal custody, for it is necessary, in order to see to it that the plan is fully carried out, to ensure that the new trustee for secured creditors receives all the trust funds. The exercise of the court's power to compel such an old trustee to restore trust assets, lost by its negligent conduct, concerns the *res* itself and is, therefore, *quasi in rem*. *Princess Lida* v. *Thompson*, 305 U. S. 456, 462, 465, 466, 59 S. Ct. 275, 83 L. Ed. 285; *Mandeville* v. *Canterbury*, 63 S. Ct. 472, 87 L. Ed. ——. The claim for restitution is part of the estate within the court's jurisdiction; the old trustee's liability is as much a part of the *res* to be administered as any other part; to make the old trustee account is as much the court's duty as to make it turn the securities in its possession over to the new trustee. Consequently, in the case at bar, the old corporate trustees were parties to the reorganization proceeding and not 'adverse claimants'; since they were not 'adverse claimants', there was no need to bring plenary suits against them, although, as we said in the *Central Hanover* case, 2 Cir., 105 F. 2d 130, 132, the bankruptcy court, in its discretion, could have directed the bringing of such plenary suits. But no matter where brought, and whether or not each such restoration action be considered as a suit against one of the old trustees or as

> a suit begun by its own petition for adjudication of its liabilities, in any event the claims asserted against it were part of the trust fund or *res* in the custody and entitled to the protection of the reorganization court."

It is clear, therefore, that the bankruptcy court has undoubted jurisdiction over the accountings by the Corporate Trustees. It is also clear that such accountings were not in the nature of plenary suits. But even if they were, Section 250 would apply to the order on allowances.

In cases decided under the former Bankruptcy Act, involving services in plenary suits to set aside fraudulent transfers, allowances for such services were passed upon by the bankruptcy court in the bankruptcy proceeding. And orders on such allowances were administrative orders governed by former Section 24b (11 U. S. C. A., Sec. 47b), and were appealable only in the discretion of the Circuit Courts of Appeals. Such was the situation in *In re Barceloux*, 74 F. 2d 289, where the Court stated, page 294:

> "On the question of attorney fees, the District Court must be sustained for another reason. The allowance was an administrative order appealable only under section 24b (11 U. S. C. A., Sec. 47b). Under this section our review is limited to the question of law—whether there was a manifest abuse of discretion by the District Court."

The New York Court of Appeals has held only recently, that where a plenary suit was brought in the State Court to recover on claims belonging to a bankrupt estate, the bankruptcy court has exclusive jurisdiction to pass upon allowances, and that attorneys have no lien for their services under Section 475 of the Judiciary Law of the State of New York. *In the Matter of B. H. Inness Brown, et al.,* ..... N. Y. ....., decided April 22, 1943, not yet officially reported, Law Report News, April 27, 1943, Volume 4, No. 2, page 3. The Court of Appeals stated:

> "* * * Not only does chapter 10 specifically confer exclusive jurisdiction of the debtor and its property

upon the Federal court, but in addition there is specifically given exclusive jurisdiction to determine costs, expenses and reasonable compensation for services rendered in reorganization proceedings (Bankruptcy Act, Secs. 62, 241-250), and there are set forth numerous meticulous provisions designed to make effective the control of the federal court over fees and expenses.

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* * * Where attorneys have been appointed in a reorganization proceeding to deal with an asset belonging to the debtor, it is difficult to see how a provision of the New York Judiciary Law (Sec. 475) could constitutionally provide for a lien upon these assets. (*Kalb* v. *Fuerstein*, 308 U. S. 433, 439.)

The control provided by the Bankruptcy Act over costs and expenses of administration, particularly including fees and allowances, is an important part of the entire reorganization and bankruptcy system."

The instant case is even stronger than the *Matter of B. H. Inness Brown, et al.*, since the services and expenses for which the awards were made were rendered and incurred in the bankruptcy court and not in the state court.

In *Shulman* v. *Wilson-Sheridan Hotel Co.*, 301 U. S. 172, the allowances involved were for legal services in a state court foreclosure suit antedating the Sec. 77B proceedings. The awards were made after confirmation of a plan. This Court held that under former Sec. 24(b), appeal from the allowance order could only be had in the discretion of the appellate court. Cf. *Gross* v. *Irving Trust Co.*, 289 U. S. 342. And in the *Dickinson* case, this Court said that the history of Section 250, indicated that the purpose of the Section was "to carry over into the new act the rule of" the *Shulman* case (309 U. S. 382, 385).

The purpose of Section 250, as this Court decided in the *Dickinson* case is to avoid frivolous appeals from orders on allowances. Petitioners have not advanced any sound reason for making an exception in this case.

II

CONCLUSION

The petition for writs of certiorari should be denied.

Respectfully submitted,

CHARLES H. KELBY,
Pro se and Counsel for the Trustees of Prudence-Bonds Corporation, Debtor, Geo. C. Wildermuth and Clifford S. Kelsey.

CHARLES M. MCCARTY,
Counsel for Prudence-Bonds Corporation (New Corporation).

May 14, 1943.